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ABSTRACT

On June 23, 2003, the United States Supreme Court upheld the constitutionality of race-conscious admissions policies designed to promote diversity in higher education. The Grutter versus Bollinger decision upheld the University of Michigan Law School race-conscious admissions policy as constitutional. However, in Gratz versus Bollinger, it held that the University's current undergraduate admissions policy was not narrowly tailored to advance an interest in diversity because it was not sufficiently flexible and did not provide enough individualized consideration of applicants to the University. This paper analyzes the University of Michigan cases and discusses their impact on higher education policymaking and on the constitutional assessment of affirmative action programs. Part one examines the U.S. Supreme Court's opinions in the Grutter and Gratz cases and discusses the constitutional boundaries for race-conscious admissions policies established by the Court. Part two examines the appropriate use of race in higher education admissions policies, as well as race-conscious financial aid, recruitment, and support programs. Part three examines the potential impact of the decisions on areas outside of higher education, including K-12 education and employment. (SM)

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Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases

A Joint Statement of Constitutional Law Scholars

July 2003

The Civil Rights Project
HARVARD UNIVERSITY

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Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases

"Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."

– *Grutter v. Bollinger*

Introduction

On June 23, 2003, the United States Supreme Court upheld the constitutionality of race-conscious admissions policies designed to promote diversity in higher education. In a 5-to-4 decision in *Grutter v. Bollinger,*[1] the Supreme Court, drawing on Justice Powell's opinion in the 1978 case of *Regents of the University of California v. Bakke,*[2] held that student body diversity is a compelling governmental interest that can justify the use of race as a "plus" factor in a competitive admissions process. Applying its "strict scrutiny" standard of review within the context of higher education, the Supreme Court upheld the University of Michigan Law School admissions policy as constitutional. However, in a 6-to-3 decision in *Gratz v. Bollinger,*[3] the Supreme Court held that the University's current undergraduate admissions policy was not narrowly tailored to advance an interest in diversity because it was not sufficiently flexible and did not provide enough individualized consideration of applicants to the University.

In ruling that the promotion of student body diversity is a compelling interest, the Supreme Court's decisions resolve a disagreement among the lower federal courts[4] and allow selective colleges and universities throughout the country to employ race in admissions. The decisions reject the absolute race-blind approach to higher education admissions advanced by the *Grutter* and *Gratz* plaintiffs and by the U.S. government and others as *amici curiae*. The Court's decisions also effectively overrule major portions of the 1996 ruling of the U.S. Court of Appeals

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[1] Grutter v. Bollinger, No. 02-241, 2003 WL 21433492 (U.S. June 23, 2003).

[2] 438 U.S. 265 (1978).

[3] Gratz v. Bollinger, No. 02-516, 2003 WL 21434002 (U.S. June 23, 2003).

[4] The challenges to the admissions policies at the University of Michigan and at public universities in other states led to significantly different outcomes in the lower courts. The U.S. Court of Appeals for the Ninth Circuit in *Smith v. University of Washington Law School,* 233 F.3d 1188 (9th Cir. 2000), *cert. denied,* 121 S. Ct. 2192 (2001), the U.S. Court of Appeals for the Sixth Circuit in *Grutter v. Bollinger,* 288 F.3d 732 (6th Cir. 2002), and the U.S. District Court in *Gratz v. Bollinger,* 122 F. Supp. 2d 811 (E.D. Mich. 2000), ruled that *Bakke* was still a valid precedent and that promoting diversity is a compelling governmental interest. In *Hopwood v. Texas,* 78 F.3d 932 (5th Cir.), *cert. denied,* 518 U.S. 1033 (1996), the U.S. Court of Appeals for the Fifth Circuit held in 1996 that *Bakke* was no longer good law and that the interest in promoting diversity was not compelling. The U.S. Court of Appeals for the Eleventh Circuit in *Johnson v. Board of Regents,* 263 F.3d 1234 (11th Cir. 2001), assumed for the sake of argument that promoting diversity was a compelling interest, but struck down the University of Georgia's race-conscious admissions policy because it was not narrowly tailored to advance the interest in promoting diversity

for the Fifth Circuit in *Hopwood v. Texas*,[5] and will allow colleges and universities in the states of Texas, Louisiana, and Mississippi to use race-conscious admissions policies designed to advance diversity. State universities in California, Washington, and Florida are still prohibited under their state laws from employing race-conscious admissions policies; however, private universities in those states can employ properly designed race-conscious policies consistent with their obligations under Title VI of the Civil Rights Act of 1964 and other federal laws.[6]

Taken together, the Court's opinions in the *Grutter* and *Gratz* cases reinforce the importance of flexible and holistic admissions policies that employ a limited use of race. The Court's opinion in the law school case, *Grutter v. Bollinger*, confirms that admissions programs which consider race as one of many factors in the context of an individualized consideration of all applicants can pass constitutional muster. The Court's decision to strike down the undergraduate admissions policy in *Gratz* as unconstitutional also makes clear that policies which automatically and inflexibly assign benefits on the basis of race, such as the University's undergraduate point system that allocated a fixed number of points for underrepresented minority group members, are constitutionally suspect. Universities that employ systems which lack sufficient individualized review will need to re-examine their current admissions policies to determine whether their policies require adjustment or revision in light of the Court's decision in *Gratz*. Institutions that have adopted more restrictive policies than the Court's decisions allow may wish to re-examine their policies to ensure that they are not "overcorrecting" out of a misplaced fear of being held legally liable.

The University of Michigan decisions involve university admissions policies, but the decisions have significant implications both inside and outside of higher education. The rulings imply that student body diversity supplies a justification for race-conscious recruitment and outreach, as well as for financial aid and support programs. The Supreme Court did not address the recent attacks on race-*exclusive* financial aid and support programs, but the cases provide constitutional moorings for the defense of such programs when they are designed to advance diversity. The outcome of a legal test of such a program in the Supreme Court is uncertain; however, because the burdens on non-minority students in most of these programs are diffused and considerably less than in admissions decisions, the constitutional scales established by the recent decisions by no means tip obviously against these programs, especially not against programs in which individual applicants are given a "whole-person" evaluation.

Although the Supreme Court has yet to address the constitutionality of diversity-based affirmative action programs outside of higher education admissions, language in the *Grutter* decision acknowledges the importance of diversity in other contexts, including K-12 education,

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[5] 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

[6] The *Grutter* and *Gratz* cases also reaffirm the Supreme Court's earlier rulings that institutions which are covered by Title VI of the Civil Rights Act of 1964, the federal statute prohibiting discrimination on the basis of race or national origin by recipients of federal funding, are subject to standards mandated under the Equal Protection Clause when they adopt race-conscious policies. Thus the admissions policies of both public universities and private institutions that receive federal funding are subject to strict scrutiny when they take race into account. Almost all colleges and universities in the United States receive some form of federal funding and are bound by the *Grutter* and *Gratz* decisions if they employ race-conscious admissions policies. In addition, intentional discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate 42 U.S.C. section 1981, the federal law prohibiting racial discrimination in the making and enforcement of contracts.

government, and private employment and business. For instance, the Court states expressly that the benefits of affirmative action "are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." This and other statements by the Court imply that diversity may be a constitutional predicate for race-conscious affirmative action programs in areas outside of higher education.

This Paper analyzes the University of Michigan cases and discusses their impact on higher education policy making and on the constitutional assessment of affirmative action programs. The Paper is divided into three parts. Part I examines the U.S. Supreme Court's opinions in the *Grutter* and *Gratz* cases and discusses the constitutional boundaries for race-conscious admissions policies established by the Court. Part II examines the appropriate use of race in higher education admissions policies, as well as race-conscious financial aid, recruitment, and support programs. Part III examines the potential impact of the decisions on areas outside of higher education, including K-12 education and employment.

I. *Grutter, Gratz,* and the Constitutional Boundaries of Race-Conscious Admissions

The University of Michigan cases reaffirm the Supreme Court's fundamental requirement that race-conscious policy making – even if designed to benefit racial minority groups – is subject to "strict scrutiny," the highest standard of review used by the courts to evaluate the constitutionality of policies under the Equal Protection Clause of the Fourteenth Amendment.[7] Under strict scrutiny, the courts ask two questions to assess the ends and the means that underlie race-conscious policy making: (1) Is the goal of a race-conscious policy sufficiently important to constitute a "compelling governmental interest"? and (2) If so, is the policy "narrowly tailored" to advance that interest?

Strict scrutiny is exacting but it is not rigid. As the Supreme Court made clear in *Grutter v. Bollinger*, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause"[8] and "strict scrutiny must take 'relevant differences' into account."[9] Applying strict scrutiny within the context of evaluating an inclusive higher education policy, the Supreme Court ruled in *Grutter v. Bollinger* that colleges and universities do have a compelling interest in obtaining a diverse student body. Employing a multi-factor test of narrow tailoring, the Court upheld the University of Michigan Law School's admissions policy in *Grutter*, but struck down the University's undergraduate policy in *Gratz* for lacking the necessary flexibility and individualized consideration required under narrow tailoring.

A. The Compelling Interest in Diversity

Like hundreds of selective colleges and universities throughout the country, the University of Michigan relied on Justice Powell's opinion in *Regents of the University of*

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[7] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[8] *Grutter*, 2003 WL 21433492, at *13.

[9] *Id.* (quoting *Adarand*, 515 U.S. at 228).

California v. Bakke as the legal underpinning for its diversity-based admissions policies. In *Bakke*, a fragmented Supreme Court struck down the race-conscious special admissions policy at the medical school of the University of California, Davis, but reversed a lower court's ruling that race could never be considered a factor in admissions. Justice Powell provided the fifth vote for a majority of the Court which found that the medical school's special admissions policy – a plan that set aside 16 out of 100 seats in the entering class for disadvantaged minority applicants – was illegal because it precluded white applicants from competing for those special admissions seats. But Justice Powell, as part of a different five-member majority, also held that the use of race as one of many factors in a competitive admissions process would be constitutionally permissible.[10]

Justice Powell's pivotal opinion stated that a university's interest in promoting broad diversity – and not just racial diversity – within its student body is grounded partly in the academic freedoms historically accorded to institutions of higher education and constitutes a compelling governmental interest that can justify the limited use of race in admissions. Relying on the undergraduate admissions policy at Harvard College as a case in point, Justice Powell went on to distinguish an illegal policy such as the Davis medical school plan, in which white applicants could not compete for specified seats in an entering class, from a legal policy such as the Harvard plan, in which race is employed as a "plus" factor in a competitive process in which all applicants are eligible to compete for the same seats in the entering class. Under a plus-factor admissions policy, an applicant's race could "tip the balance" in an admissions decision, but race would be only one of many factors under consideration.

Outside of the *Bakke* case and prior to the University of Michigan decisions, the Supreme Court had issued only a handful of decisions on the application of strict scrutiny to affirmative action policies.[11] The Supreme Court's 1989 ruling in *City of Richmond v. J.A. Croson Company*[12] made clear that an institution can have a compelling interest in remedying the present effects of its own past discrimination, and of specifically identifiable discrimination by contractors in the local market.[13] However, the Court also ruled in *Croson* that remedying the lingering effects of *societal* discrimination was too broad and amorphous a goal to constitute a compelling interest that could justify a race-conscious contracting program. Similarly, a plurality

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[10] *Bakke*, 438 U.S. at 320.

[11] In a separate line of cases, the Court has upheld the use of race-conscious and gender-conscious affirmative action programs in private employment under Title VII of the Civil Rights Act of 1964. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979) (upholding race-conscious affirmative action program); Johnson v. Transportation Agency, 480 U.S. 616 (1987) (upholding gender-conscious affirmative action program). The Court has also ruled in the area of legislative districting that race cannot serve as the "predominant factor" in decision making. *See* Miller v. Johnson, 515 U.S. 900 (1995). The Court did not directly address either of these lines of cases in its *Grutter* and *Gratz* opinions.

[12] 488 U.S. 469 (1989).

[13] For instance, a university that for several years denied admission to African American applicants because of race (its own past discrimination) can have a compelling interest in remedying the absence of African American students in its student body (the present effects of discrimination), and can employ race-conscious measures to address the problem. The institution must, however, offer significant evidence of its past discrimination and the present effects of that discrimination in order to satisfy strict scrutiny. Thus the Court has imposed a "strong basis in evidence" rule in remedial cases to ensure that an institution's stated motivation in remedying discrimination is truly remedial and not a pretext for an invidious motivation. *See Adarand*, 488 U.S. at 500.

of the Court ruled in *Wygant v. Jackson Board of Education*[14] that trying to remedy societal discrimination by providing role models for minority students was not a sufficiently compelling interest to justify a race-conscious layoff policy.

In *Grutter v. Bollinger*, Justice O'Connor's majority opinion establishes that a non-remedial interest can justify the use of race if it is sufficiently compelling, and the opinion fully endorses Justice Powell's determination in *Bakke* that obtaining a diverse student body is a compelling governmental interest for an institution of higher learning: "[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body."[15]

In endorsing the compelling interest in student body diversity, the *Grutter* opinion draws on Justice Powell's recognition in *Bakke* that institutions of higher education have been afforded a degree of deference by the courts because of academic freedoms rooted in the First Amendment: "Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. . . . We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[16] The *Grutter* opinion also establishes a presumption of good faith on the part of universities in selecting their student bodies: "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"[17]

The *Grutter* opinion offers a ringing endorsement of the value of student body diversity in promoting numerous benefits, including:

- concrete educational benefits;
- assisting in the breakdown of racial and ethnic stereotypes; and
- the development of a diverse, racially integrated leadership class

Citing expert reports in the trial record and research studies documenting the educational benefits of diversity, the *Grutter* opinion recognizes that student body diversity leads to substantial educational benefits for *all* students, including the promotion of cross-racial understanding, improved classroom discussions and other positive learning outcomes, and enhanced preparation for an increasingly diverse workforce and society.[18] Moreover, according to the Court, student body diversity "helps to break down racial stereotypes"[19] and "diminishing

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[14] 476 U.S. 267 (1986).
[15] *Grutter*, 2003 WL 21433492, at *14.
[16] *Id.* at *14.
[17] *Id.* at *14 (quoting *Bakke*, 438 U.S. at 318-19).
[18] *Id.* at *15.
[19] *Id.*

the force of such stereotypes is both a crucial part of [an institution's] mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[20]

Citing *Sweatt v. Painter,* the *Grutter* Court also recognized that institutions of higher learning, and law schools in particular, provide the training ground for many of our Nation's leaders. Individuals with law degrees, for instance, occupy large numbers of the nation's state governorships, seats in both houses of Congress, and federal judgeships. According to the Court, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[21] Access to higher education "must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[22]

The *Grutter* opinion also draws significantly on the importance of diversity in business and in the military to support the value of diversity in higher education. "[M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. . . . What is more, high-ranking retired officers and civilian leaders of the United States military assert that . . . a 'highly qualified, racially diverse officer corps is essential to the military's ability to fulfill its principle mission to provide national security.'"[23]

Although the Court's deference to academic freedom might suggest that higher education provides a unique context for ruling that diversity is a compelling interest, the Court's clear language supporting the value of diversity throughout the educational system and in other sectors of American life implies that the Court's ruling may have broader application. For example, the *Grutter* opinion states: "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."[24] Quoting *Brown v. Board of Education,* the *Grutter* opinion affirms that "'education . . . is the very foundation of good citizenship'" and therefore "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."[25]

One of the Court's most powerful statements thus underscores the compelling interest in promoting diversity in higher education and the importance of racial integration and diversity in civic life more generally: "'[E]nsuring that public institutions are open and available to all

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[20] *Id.* at *17.
[21] *Id.*
[22] *Id.* at *16.
[23] *Id.* at *16 (quoting Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27)).
[24] *Id.* at *16.
[25] *Id.* (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

segments of American society, including people of all race and ethnicities, represents a paramount government objective.' . . . And, '[n]owhere is the importance of such openness more acute than in the context of higher education.' . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[26]

B. Narrow Tailoring: A *Bakke*+ Test

Under the narrow tailoring prong of strict scrutiny, the courts evaluate the "fit" between a compelling interest and the policy adopted to advance that interest. The Supreme Court has not developed a uniform test of narrow tailoring in equal protection cases, but the Court has offered various guidelines in its earlier cases addressing race-conscious policies; the analyses employed in *Grutter* and *Gratz* draw on several of these guidelines. In *Bakke*, Justice Powell discussed two elements of narrow tailoring specific to admissions policies designed to promote diversity in higher education: First, an admissions policy must not rely on separate tracks or quotas that insulate racial minorities from competitive review. Second, race must be employed as a "plus" factor that serves as only one of many factors being weighed in a competitive process that evaluates the particular qualifications of each individual applicant.

In *United States v. Paradise*,[27] a case in which the Supreme Court upheld a court-ordered promotions policy designed to remedy discrimination in public employment, a plurality of the Court examined four narrow tailoring factors: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of numerical goals to the relevant market; and (4) the impact of the relief on the rights of third parties. The Court also articulated narrow tailoring guidelines in *Wygant v. Jackson Board of Education* and *City of Richmond v. J.A. Croson Co.*, where the Court raised the need to have a "logical stopping point" for a remedial program to be narrowly tailored. This inquiry is similar to the second *Paradise* factor; if the program is designed to remedy past discrimination, there must be a clear point at which the remedy is complete and the program ends.[28]

Stating that the narrow tailoring test "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education,"[29] the Supreme Court's articulation of the narrow tailoring test in *Grutter* combines elements from *Bakke* and the Court's remedial cases into five basic inquiries:

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[26] *Id.* at *16 (quoting Brief of the United States as *Amicus Curiae* 13) (citations omitted).

[27] 480 U.S. 149 (1987).

[28] The Court has also drawn on principles of overinclusiveness and underinclusiveness in its remedial cases. In *Croson*, for example, the Court held that an affirmative action policy that included minorities such as Latinos and Asian Americans (groups who only recently entered the applicant pool) was overinclusive and not narrowly tailored to remedying previous discrimination against African Americans. In non-remedial cases, the lower courts have not developed a consistent test for narrow tailoring. One approach has been to turn to the *Paradise* factors and to substitute language, such as an admissions pool in education, for language related to a market for labor or contractors. Other courts, however, have been less precise in articulating narrow tailoring principles for non-remedial cases, relying on a simple nexus between the policy and its underlying goals that is logical and well-documented in the record.

[29] *Grutter*, 2003 WL 21433492, at *17.

- Does the program offer a competitive review of all applications (i.e., no quotas or separate tracks to insulate minorities)?
- Does the program provide flexible, individualized consideration of applicants so that race is only one of several factors being considered?
- Has the institution considered workable race-neutral alternatives to its program?
- Does the program unduly burden non-minority applicants?
- Is the program limited in time, so that it has a logical end point?[30]

The *Grutter* Court applied all five of these inquiries in upholding the University of Michigan Law School's admissions policy. The *Gratz* Court focused on the second inquiry and found that the University's undergraduate admissions policy lacked the necessary flexibility and individualized review to satisfy narrow tailoring. Each of these narrow tailoring inquiries is discussed below.

1. Competitive Review

The *Grutter* opinion adopts Justice Powell's prohibition of the use of quotas, set-asides, or separate tracks for minority applicants to advance the interest in diversity.[31] However, as the *Grutter* Court delineates, quotas are distinct from *goals*:

> Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." Quotas "'impose a fixed number or percentage which must be attained, or which cannot be exceeded,'" and "insulate the individual from comparison with all other candidates for the available seats." In contrast, "a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself," and permits consideration of a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants."[32]

Accordingly, an admissions policy that employs race as a plus factor, even if it gives greater weight to race than to some other factors, is not the functional equivalent of a quota. Nor, according to the Court, does "some attention to numbers" necessarily transform a flexible

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[30] The Supreme Court's test is also similar to the test employed by the Eleventh Circuit in *Johnson v. Board of Regents*, 263 F.3d 1234 (11th Cir. 2001), where the U.S. Court of Appeals for the Eleventh Circuit adapted the *Paradise* factors to evaluate the race-conscious admissions policy at the University of Georgia. The *Johnson* factors focus on whether the policy uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer; whether the policy fully and fairly takes account of race-neutral factors which may contribute to a diverse student body; whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and whether the school has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity.

[31] It is important to note that quotas or set-asides are not per se unconstitutional. Under *Grutter*, they may not be employed to advance the interest in educational diversity, but they may be used to advance the compelling interest in remedying the present effects of past discrimination; indeed, the Court approved the use of a hiring quota in *United States v. Paradise*, and the lower courts frequently have approved quotas or set-asides as short-term remedies for past discrimination.

[32] *Grutter*, 2003 WL 21433492, at *18 (citations omitted).

admissions system into a quota. There is, as Justice Powell noted in *Bakke*, "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted."[33] Thus, a goal that seeks racial minority enrollments beyond a token number, but does not establish a fixed number or percentage of admittees, can be an appropriate objective for colleges and universities.

2. Flexible, Individualized Consideration

Taking the *Grutter* and *Gratz* cases together, the most important inquiry into whether a race-conscious admissions policy is narrowly tailored is whether it is flexible and provides sufficient individualized consideration of all applicants. According to the *Grutter* Court:

> When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.[34]

This language implies that race cannot be the exclusive or the predominant factor in an admissions decision. Moreover, even though institutions are entitled to some deference in defining the qualifications and composition of their student bodies, a race-conscious admissions policy must consider at least some *non*-racial factors to ensure that "all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."[35] The *Grutter* Court endorsed an admissions policy that "seriously weighs many other diversity factors besides race that can make a real and dispositive difference for nonminority applicants as well."[36]

On the other hand, an admissions policy that employs a mechanistic or automatic assignment of a benefit based on race is not sufficiently flexible to satisfy narrow tailoring. Nor is a policy that offers such a heavy advantage to minority applicants that it virtually guarantees their admission. According to the *Gratz* Court, a flexible admissions program does not "contemplate that any single characteristic automatically ensure[s] a specific and identifiable contribution to a university's diversity. . . . Instead, . . . each characteristic of a particular applicant [is] to be considered in assessing the applicant's entire application."[37] And, as the Court further emphasizes in *Gratz*, an argument of administrative convenience – such as having to deal more easily with the high volume of applications at a large state university – may lead an institution to prefer a more mechanical approach over a more individualized (and resource-intensive) admissions policy, but administrative convenience will not shield the institution from a finding of unconstitutionality.

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[33] *Id.* (quoting *Bakke*, 438 U.S. at 323).
[34] *Id.* at *19.
[35] *Id.* at *20.
[36] *Id.* at *20.
[37] *Gratz*, 2003 WL 21434002, at *15.

3. Race-Neutral Alternatives

Narrow tailoring, according to the *Grutter* Court, also requires "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[38] However, consideration of race-neutral alternatives does not require that an institution try to exhaust every possible alternative, nor does narrow tailoring require that institutions choose between maintaining a reputation for excellence and selectivity on the one hand and maintaining a commitment to diversity on the other.[39] The *Grutter* Court's requirement focuses instead on an institution's documentation of its good faith efforts to develop effective solutions that can advance its interests in being both selective and diverse.

The appropriateness and *workability* of a race-neutral alternative are critical in this inquiry. As the *Grutter* Court recognized, race-neutral alternatives such as a lottery system or a lowering of admissions standards could seriously compromise a school's parallel interest in selectivity and could actually impair diversity by precluding individualized review. Policies such as "percent plans," which guarantee admission to all students in the state who graduate from their high school with a class ranking above a specified threshold (e.g., the top ten percent), are not viable alternatives at many colleges and universities, particularly graduate or professional schools.[40] A consideration of race-neutral alternatives should reflect an institution's serious attempt to weigh viable options, and to adopt race-neutral programs if the goals of diversity are more effectively served through those programs.

4. Undue Burden on Non-Minorities

"To be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'"[41] Although a denial of admission to a particular college or university may impose a burden on an applicant, selective institutions are often in the business of rejecting more applicants than they accept, and no student involved in a truly competitive admissions process has a right or an entitlement to admission to a selective school. As the *Grutter* Court notes, a fair and flexible admissions *process* that considers both non-racial and racial factors will allow non-minorities to be competitive with minorities, and will therefore not impose an undue burden. An institution can "select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants"[42] and "a rejected applicant 'will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.'"[43]

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[38] *Grutter*, 2003 WL 21433492, at *21.

[39] The *Grutter* Court specifically rejects Justice Scalia's contention that strict scrutiny of racial classifications requires institutions to forgo selective admissions standards if they aim for diversity in their student bodies.

[40] *Id.* The *Grutter* Court also cautioned that percent plans should be that they do not "preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." *Id.*

[41] *Id.* at *22.

[42] *Id.*

[43] *Id.* (quoting *Bakke*, 438 U.S. at 318).

5. Time Limits

A final narrow tailoring inquiry focuses on the duration of race-conscious admissions policies. Although an institution may have a permanent interest in gaining the benefits of a diverse student body, its use of race to advance that goal is subject to time limits. As the Court emphasized in *Grutter*: "The requirement that all race-conscious admissions programs have a termination point 'assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.'"[44] However, fixed or absolute time limits are not mandated. According to the *Grutter* Court, a durational requirement can be satisfied by sunset provisions or by periodic reviews to determine whether a race-conscious policy is still needed to achieve student body diversity. The *Grutter* Court further exhorted that the effectiveness of race-neutral policies at other schools should be monitored as part of a periodic review and evaluation of a race-conscious policy.

There is also language in the *Grutter* opinion that has been interpreted by some, including Justices Thomas and Scalia,[45] to impose a formal end date for all race-conscious affirmative action programs in higher education: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[46] This sentence should be construed as the Court's dictum expressing, by reference to the passage of time since the *Bakke* decision, its aspiration – and not its mandate – that there will be enough progress in equal educational opportunity that race-conscious policies will, at some point in the future, be unnecessary to ensure diversity. Moreover, the Court's statement in no way undercuts the enduring nature of the *interest* involved: the Court's language expresses its understanding that diversity will continue to be a compelling interest, but that less race-conscious measures will be required to produce it, and not that diversity will be any less important twenty-five years from now.

C. Applying Narrow Tailoring to the University of Michigan Policies

1. *Grutter v. Bollinger*

The University of Michigan Law School's admissions policy – a "whole-file review" policy – was modeled directly on the Harvard College plan cited by Justice Powell in *Bakke* and employs race as one factor in an individualized review process that also considers numerical criteria such as grades and standardized test scores, along with life experiences and personal backgrounds in order to create a student body that is both well-prepared academically and broadly diverse. Admissions officials are required to evaluate each applicant on the basis of all of the information in the file, including a personal statement, letters of recommendation, and a personal essay describing the applicant's potential contribution to the diversity of the Law School. In addition, the Law School's diversity policy maintains a special commitment to

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[44] *Id.* at *23 (quoting *Croson*, 488 U.S. at 510).

[45] *See, e.g., id.* at *43 (Thomas, J., concurring in part and dissenting in part) ("The Court holds that racial discrimination in admissions should be given another 25 years before it is deemed no longer narrowly tailored to the Law School's fabricated compelling state interest.")

[46] *Id.* at *23.

attaining a "critical mass" of underrepresented minority students, such as African Americans, Latinos, and Native Americans, whose numbers in the student body might not meaningfully contribute to diversity if there were no special commitment. "Critical mass" is not a fixed number or percentage, however; instead it reflects the Law School's goal of attaining minority enrollments that exceed token numbers.

Applying its multi-factor test of narrow tailoring to the Law School's admissions policy, the *Grutter* Court found that the policy satisfied all of the required elements of narrow tailoring. The Court found the policy to be flexible and individualized, with both racial and non-racial factors being considered to evaluate applications, and with no undue burdens being imposed on non-minority applicants. The Court also determined that the Law School's goal of attaining a "critical mass" of underrepresented minority students is not a quota, but is instead a flexible goal, as demonstrated by its definition and implementation and by actual admissions outcomes, which revealed a significant fluctuation of minority admissions from year to year; moreover, the Court declared itself untroubled by the Law School's frequent review of its admissions data during the admissions season. The Court ruled that the Law School's consideration of race-neutral alternatives had been undertaken seriously and in good faith, and had produced no workable alternatives. Finally, the time limit requirement of narrow tailoring was satisfied by the Law School's stated commitment to terminating its consideration of race as soon as practicable.

The *Grutter* Court dismissed the argument, raised in the dissenting opinion of Justice Kennedy, that Law School was engaging in racial balancing and manipulating outcomes to reach its target goals, by noting that "between 1993 and 2000, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota."[47] Moreover, the *Grutter* Court found unpersuasive the arguments in Chief Justice Rehnquist's dissent that the Law School was concealing an attempt to achieve racial balancing and that the Law School discriminated among different groups within the critical mass. The Court observed that "the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year."[48]

2. *Gratz v. Bollinger*

Like the Law School's policy, the admissions policy in place at the University of Michigan's College of Literature, Science, and the Arts from 1999 to 2003 drew inspiration from Justice Powell's "plus" factor analysis in *Bakke*; however, the undergraduate policy employed significantly different procedures. Under one element of the policy, a point system that allocated a maximum of 150 points to any given applicant, race was considered along with several other criteria, including grades (counting for up to eighty points), standardized test scores, socioeconomic status, geographic factors, alumni relationships, personal achievement, leadership and service skills, and writing an outstanding essay. Members of underrepresented minority groups automatically received twenty points under the system, although the same twenty points were also available to individuals from socio-economically disadvantaged backgrounds,

[47] *Grutter*, 2003 WL 21433492, at *19.
[48] *Id.*

graduates of predominantly minority high schools, scholar-athletes, and individuals who bring special qualities identified by the University's Provost.

Under the other element of the undergraduate admissions policy, admissions officers could, after a threshold review, "flag" certain applications to keep the applicant in the pool for consideration at a later time. Applications from underrepresented minority group members could be flagged, as could applications from students who were at the top of their class; those residing in a preferred county of Michigan; those exhibiting unique life experiences, challenges, interests, or talents; those from a disadvantaged background; and those who are recruited athletes.[49]

The majority opinion in *Gratz*, authored by Chief Justice Rehnquist, focuses on the flexibility and individualized consideration offered by the admissions policy, and makes no further inquiries into narrow tailoring. The *Gratz* Court found the undergraduate policy to be unconstitutional because its automatic assignment of points to members of underrepresented minority groups lacked the necessary flexibility and individualized consideration mandated under Justice Powell's *Bakke* opinion and *Grutter*. According to the Court:

> The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive . . . the LSA's automatic distribution of 20 points has the effect of making "the factor of race . . . decisive" for virtually every minimally qualified underrepresented minority applicant.[50]

The Court's ruling does not mean that a numerical admissions system is per se unconstitutional, but an *automatic* assignment of significant points or benefits based on race lacks the essential flexibility required for narrow tailoring. The *Gratz* opinion does not indicate whether a lower allocation of points for race might have been acceptable, but the Court expressed clear disapproval of the University's distribution of "one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race . . . ."[51] Thus, while the Court's inquiry focuses on flexibility, its criticism of the point system also reveals its condemnation of separate tracks and quota-like policies that virtually guarantee admission for minority applicants.

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[49] The undergraduate admissions policy in effect from 1995 to 1998 was declared unconstitutional by the *Gratz* district court. The admissions policy offered "protected" spaces to ensure the consideration of minority candidates, as well as in-state residents, athletes, foreign applicants, and ROTC candidates, during a rolling admissions process. Under the program, a number of protected spaces were reserved in the overall pool of admittees, and spaces were used up as members of a protected group were admitted over the admissions season. Although the University contended that the policy never separated candidates from competitive review, the district court characterized the protected space as an insulation of minority applicants from competition with non-minorities and as the functional equivalent of a quota. The Supreme Court declined to address the constitutionality of the prior program in its *Gratz* decision and left the lower court's ruling on this policy intact.

[50] *Gratz*, 2003 WL 21434002, at *15 (quoting *Bakke*, 438 U.S. at 317).

[51] *Id.* at *14.

The *Gratz* Court ignored the argument raised in Justice Souter's dissenting opinion that an equivalent number of points were available to non-minority applicants for satisfying criteria such as socio-economic disadvantage or attending a predominantly minority high school, which could lead to non-minority applicants' achieving higher overall scores than minority applicants; the Court also found unpersuasive Justice Souter's argument that the reason that the University admitted virtually all qualified minority applicants might reflect nothing more than the likelihood that very few qualified minority applicants apply, or that the self-selection of minority students might result in a strong minority applicant pool.[52]

The *Gratz* Court also found that the "flagging" system did not save the undergraduate policy from unconstitutionality. Although the flagging system offered the possibility of individualized review, the Court found that it was infrequently used and that the review of individual files occurred after admissions counselors had already administered a racial "plus" factor.[53] The Court went on to reject the University's administrative convenience argument, stating that "the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."[54]

Although it was not briefed by any of the parties, the question of a plaintiff's standing to sue was also addressed by the *Gratz* Court, primarily in response to Justice Stevens' dissenting opinion proposing that Patrick Hamacher, a student who was denied admission as a freshman but did not apply as a transfer student, lacked standing to sue for prospective relief. The Court ruled that Hamacher did have standing to sue even though he had not applied as a transfer student because he had expressed the intent to apply as a transfer student if a race-conscious policy were not being used and because the freshman and transfer policies employed essentially the same criteria.[55]

D. Concurring and Dissenting Opinions

Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer formed the majority in *Grutter*. Justice Ginsburg filed a concurring opinion in *Grutter*; Justices Scalia and Thomas each filed opinions concurring in part and dissenting in part; Chief Justice Rehnquist and Justice Kennedy each filed dissenting opinions. In *Gratz*, Chief Justice Rehnquist and Justices

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[52] *Id.* at *15 n.19.

[53] The *Gratz* Court found unpersuasive the arguments in Justice Souter's dissent that the record below was incomplete and that the case should be vacated and remanded for additional evidence regarding the actual operation of the flagging system. *Gratz*, 2003 WL 21434002, at *28 (Souter, J., dissenting). In her concurring opinion in *Gratz*, Justice O'Connor, joined in large part by Justice Breyer, also noted the incompleteness of the record on the flagging system, but, based on the available evidence, found the system lacked sufficient individualized review. *Id.* at *17 (O'Connor, J., concurring). Thus with a more complete record, the flagging system might have gained approval from a majority of the Court.

[54] *Gratz*, 2003 WL 21434002, at *17.

[55] The *Gratz* Court ultimately found violations of the Equal Protection Clause, Title VI, and 42 U.S.C. section 1981. The Court reversed the relevant parts of the district court's ruling in *Gratz*, and remanded the case for further consideration. On remand, the lower court may award damages or injunctive relief to the plaintiffs, but should not order the admission of any plaintiffs. Rather than gaining admission, a proper remedy, whether court-imposed or voluntarily developed by the University, would be to have access to a constitutional admissions process that complies with the Court's rulings in *Grutter* and *Gratz*.

O'Connor, Scalia, Kennedy, and Thomas formed a majority, with Justice Breyer concurring in the judgment of the Court. Justices O'Connor, Thomas, and Breyer each filed concurring opinions; Justices Stevens, Souter, and Ginsburg each filed dissenting opinions. This Paper does not provide a thorough discussion of all of the concurring and dissenting opinions, focusing instead on the basic holdings of the cases. However, a number of the opinions do provide insights into future affirmative action cases and may prove significant if the voting alignment of the Court shifts.

1. Additional Votes for Diversity: Justice Kennedy's Opinion in *Grutter*

Justice Kennedy's dissenting opinion in *Grutter* indicates that he agrees in theory with the majority's holding that promoting student body diversity is a compelling governmental interest. His dissent focuses instead on the majority's narrow tailoring analysis and the strictness of the Court's review in finding the Law School's policy constitutional. Language in Justice Kennedy's dissent actually goes further than the majority opinion in identifying *racial* diversity as a constitutionally permissible goal: "Our precedents provide a basis for the Court's acceptance of a university's considered judgment that *racial* diversity among students can further its educational task, when supported by empirical evidence."[56] Justice Kennedy writes approvingly of "the use of race as a factor in the admissions process," and that "[i]n the context of a university admissions the objective of racial diversity can be accepted based on empirical data known to us";[57] moreover, he fully acknowledges "the Court's important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities . . . ."[58]

Similarly, Chief Justice Rehnquist's dissenting opinion in *Grutter* focuses on narrow tailoring and does not disagree with the majority's ruling on compelling interest, quoting the majority opinion and noting that "'in the limited circumstance when drawing racial distinctions is permissible,' the government must ensure that its means are narrowly tailored to achieve a compelling state interest."[59] Although these and other passages do not guarantee positive votes in the future, there appear to be at least six members of the Court who may be inclined to support other types of diversity-based policies, such as voluntary desegregration policies in K-12 public education, if the Court's narrow tailoring analysis is sufficiently rigorous.

2. Future Litigation: Justice Scalia's Opinion in *Grutter*

Justice Scalia's opinion in *Grutter* disagrees fundamentally with the majority's strict scrutiny analysis, but his opinion is instructive for its listing of potential claims that might be raised in the aftermath of the University of Michigan decisions:

> Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant "as an individual," . . . and sufficiently avoids "separate admissions tracks" . . . to fall

[56] *Grutter*, 2003 WL 21433492, at *49 (Kennedy, J., dissenting) (emphasis added).
[57] *Id.* (emphasis added).
[58] *Id.* at *53.
[59] *Id.* at *44 (Rehnquist, C.J., dissenting) (quoting majority opinion in *Grutter*, 2003 WL 21433492, at *17).

> under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a "good faith effort" and has so zealously pursued its "critical mass" as to make it an unconstitutional *de facto* quota system, rather than merely "a permissible goal." . . . Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter*; and while the opinion accords "a degree of deference to a university's academic decisions," . . . "deference does not imply abandonment or abdication of judicial review.") Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. (Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses – through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.) And still other suits may claim that the institution's racial preferences have gone below or above the mystical *Grutter*-approved "critical mass." Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution's composition of its generic minority "critical mass."[60]

On their face, some of these claims seem dubious, at best. For example, there is no implication in the *Grutter* opinion that the educational benefits of diversity must be documented at each and every institution that employs race-conscious admissions, nor does the existence of minority organizations or student centers on campuses mean that universities are acting in bad faith when they intend to promote diversity through their admissions policies. The omission of any racial minority group from a goal of "critical mass" does not imply that race cannot still be a factor in an applicant's individual review or that any given applicant bears an undue burden. And "critical mass" by its very nature is a flexible goal, so that, over time, actual admissions numbers may easily fall either above or below the goal.

Some of the Justice Scalia's proposed claims do, however, address areas where institutions must be careful not to overstep the bounds of the *Grutter* and *Gratz* cases, such as converting a flexible goal into a quota, or adopting race-conscious procedures that do not provide enough individualized review. Notwithstanding the unlikely success of many of these claims, they may soon appear on the horizon.

3. Proposed Limits: Justice Thomas's Opinion in *Grutter*

Justice Thomas's opinion in *Grutter*, joined in large part by Justice Scalia, purports to concur with the majority's opinion on two points; on each of these points, however, Justice Thomas misapprehends the Court's actual rulings. First, Justice Thomas proposes that the majority opinion holds that discrimination between and among minority groups in the "critical mass" is unconstitutional. In other words, universities cannot distinguish between similarly situated groups, such as blacks and Latinos. Yet, nothing in the majority opinion suggests that a university must treat all minority group members the same, or that groups within the critical

[60] *Id.* at *26 (Scalia, J., concurring in part and dissenting in part) (citations omitted).

mass must be treated identically; indeed, *Grutter* implies just the opposite – individualized review that considers race among many factors is what is constitutionally mandated. Second, Justice Thomas proposes that the majority has imposed a twenty-five-year time-limit on the use of race-conscious admissions policies in higher education. But the majority's statement on the necessity of race-conscious policies is purely aspirational, suggesting only that the passage of time should lead to changes in equal educational opportunity that will render race-conscious policies moot. Justice Thomas's opinion is, in fact, a dissenting opinion, but the arguments he raises are important to acknowledge because they may appear in future litigation.

E. Constitutional Implications

Taken together, the *Grutter* and *Gratz* opinions provide clear guidance to institutions on the constitutional boundaries of race-conscious admissions policies. The cases affirm that admissions quotas and separate admissions tracks for minorities are unconstitutional, as are admissions systems that mechanically and automatically assign benefits on the basis of race. An institution cannot use administrative convenience as a defense to a mechanistic race-conscious policy that is otherwise unconstitutional. Policies that are flexible and holistic and that consider race as one of many factors should pass constitutional muster, as long as they comply with the Court's additional narrow tailoring requirements addressing race-neutral alternatives, undue burdens, and time limits. Goals such as reaching a "critical mass" of underrepresented minority students are permissible, as long as they advance the interest in diversity and do not employ fixed admissions numbers or percentages. The interest in obtaining the benefits of student body diversity can serve as a justification for other types of race-conscious policies in higher education – such as recruitment and outreach, financial aid, and retention programs – that are narrowly tailored to the interest.

The University of Michigan cases also have important constitutional implications that extend beyond higher education admissions:

Contextual Strict Scrutiny. The *Grutter* case reconfirms what Justice O'Connor had made clear in the *Adarand* case: strict scrutiny is rigorous but not rigid. Consistent with its earlier rulings, the *Grutter* Court held that all race-based classifications, including those designed to benefit racial minorities, are subject to strict scrutiny. However, "[n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the government decisionmaker for the use of race *in that particular context*."[61] In evaluating the constitutionality an inclusive higher education policy, including a deference to academic freedoms, the *Grutter* Court applied a contextualized version of strict scrutiny.[62] The *Grutter* case confirms that strict scrutiny may be strict in theory, but it is not necessarily fatal in fact.

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[61] *Id.* at *13 (emphasis added). The Supreme Court has also upheld a race-conscious policy after an application of strict scrutiny in the area of voting rights. *See* King v. Illinois Bd. of Elections, 522 U.S. 1087 (1998) (affirming three-judge court's ruling that creation of majority-minority district was narrowly tailored to advance compelling interest in remedying potential violation of or achieving compliance with the Voting Rights Act).

[62] It is not entirely clear if the Court's particular application of strict scrutiny in *Grutter* was due to the specific context of higher education or to the more general context of racial inclusion (versus racial exclusion and subordination), or a combination of both. Future cases should clarify this issue.

Non-Remedial Interests. As a class of interests, non-remedial interests such as promoting diversity in higher education can satisfy the compelling interest requirement of strict scrutiny, if they are sufficiently compelling.[63] Prior to the University of Michigan decisions, a majority of the Supreme Court had only upheld the interest in remedying the present effects of past discrimination by a given institution. The Supreme Court and the lower courts can be expected to address the constitutionality of various non-remedial interests on a case-by-case basis.

Evidence to Support a Compelling Interest. Unlike the Court's compelling interest requirement in remedial cases, where there must be a "strong basis in evidence" to document an institution's compelling interest in remedying the present effects of its past discrimination, there was no comparable evidentiary requirement imposed by the *Grutter* Court. The Court did, however, reference a body of evidence supporting the benefits of diversity, contained in both the trial record and in the briefs of *amici curiae;* thus, one can expect that at least some quantum of evidence will be needed to support a holding that a non-remedial interest is compelling, even if the burden of producing "a strong basis in evidence" is not imposed.

Narrow Tailoring. Narrow tailoring analysis in non-remedial cases is now more closely aligned with the mandates applied in remedial cases. Although the test employed in *Grutter* may not have universal applicability because of elements applying specifically to higher education admissions, the ruling suggests that flexibility, time limits, consideration of workable race-neutral alternatives, and attention to undue burdens must be incorporated into all analyses of race-conscious policy making. The *Grutter* Court's limitation on race as a "plus" factor in admissions does not imply that race-exclusive or race-predominant programs (such as minority-targeted scholarships or support programs) are necessarily unconstitutional; but, narrow tailoring would require greater attention to the burdens imposed on non-minorities, as well as the availability of alternative policies.

Diversity Interests Outside of Higher Education. Programs seeking to promote diversity interests outside of higher education can turn to the *Grutter* case for at least partial support for their constitutionality. Clear language in the opinion addressing the importance of racial integration and diversity throughout the educational system, within the judiciary and in other branches of the government, in business, and in the military suggests that the promotion of diversity in these sectors may also be constitutionally compelling. Significant evidence, including several empirical studies offered by the University and by its *amici curiae,* was available to the Court in *Grutter,* and a similar body of evidence may be needed to support a finding that diversity in these other sectors is compelling. Nonetheless, the *Grutter* opinion establishes a solid base on which to advance these interests.

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[63] A number of lower courts have upheld non-remedial interests outside of higher education as constitutional. *See, e.g.,* Brewer v. West Irondequoit Cent. School Dist., 212 F.3d 738 (2d Cir. 2000) (upholding race-conscious student assignment plan designed to advance compelling interest in reducing racial isolation resulting from de facto segregation); Hunter ex rel. Brandt v. Regents of Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999) (upholding race-conscious admissions policy at urban laboratory school designed to advance a compelling interest in promoting educational research), *cert. denied,* 121 S. Ct. 186 (2000); Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996) (upholding race-conscious employment policy designed to advance compelling interest in promoting prison enforcement), *cert. denied,* 117 S. Ct. 949 (1997).

II. Higher Education Policies After *Grutter* and *Gratz*

The University of Michigan decisions establish the basic boundaries within which colleges and universities may employ race-conscious admissions policies. Many institutions that have followed a path similar to the University of Michigan Law School may have little to change, perhaps only needing to add time limits to their whole-file review policies and to better document their consideration of race-neutral alternatives. Other institutions, particularly those that have employed numerical systems with automatic point assignments for race, will have to undertake major reviews and revisions of their policies. The Supreme Court did not attempt to examine admissions policies outside of the two policies it addressed in *Grutter* and *Gratz*. Nor did the Court address the constitutionality of other higher education policies designed to promote student body diversity, such as recruitment and outreach, financial aid, and support and retention programs. Part II of the Paper addresses these and other issues related to higher education policy making designed to promote student body diversity.

A. Admissions Policies: Whole-File Review vs. Point Systems

The *Grutter* Court's approval of the whole-file review system employed at the University of Michigan Law School implies that the safest bet for an institution seeking to promote student body diversity is to replicate the Law School's policies and procedures – consistent, of course, with its own institutional mission. But the Court's holding in *Gratz* suggests that even a holistic, non-numerical system can be constitutionally vulnerable, if a racial "plus" factor is assigned automatically to all racial minority applicants, or if the "plus" factor is so heavily weighted in admissions decisions that it virtually guarantees admission to minority students.

Nor is quantification inherently unconstitutional. *Gratz* prohibits the mechanical and automatic assignment of significant benefits based on race, but it does not necessarily prohibit using a numerical system to make admissions decisions. Consider an admissions policy that takes into account various factors, including grades and standardized test scores, as well as life experiences, socioeconomic disadvantage, geography – any number of factors that an institution might consider important in producing a diverse student body – and race. If the assignment of points based on race is not automatic and is based on individualized review, then the policy could still be constitutional. A simplified policy might look like the following:

Admissions Factors	Maximum Points Available
Grade Point Average	50
Standardized Test Scores	15
Life Experiences*	20
Diversity Factors**	15
TOTAL:	100

* Work history, extracurricular activities, hardship, and other relevant life experiences

** Race, socioeconomic disadvantage, geography, and other factors contributing to diversity

Assume under this system that there are consistent standards across the evaluations, that each application is subject to individualized review, that the allocation of points for race is not automatic, and that the allocation of points under the life experience and diversity categories allows non-minority applicants to compete on an equal footing with minority applicants. How much should race count in such a system? *Gratz* may prohibit a fixed allocation of points, but a range of points up to a certain maximum is probably allowable. As long as the assignment of points for race is not mechanical and is not so heavily weighted that minorities are guaranteed admission, then such a plan should comply with the requirements of *Grutter* and *Gratz*.[64]

B. "Critical Mass" and Goals

The *Grutter* Court endorsed the University of Michigan Law School's goal of seeking a "critical mass" of underrepresented minority students to achieve its compelling interest in student body diversity. "Critical mass" does not refer to a fixed number or percentage of admittees, but is instead a *goal* designed to attain meaningful numbers of minority students beyond token numbers. As the Court stated in *Grutter*, a goal is not the same as a quota: "[A] 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.' Quotas 'impose a fixed number or percentage which must be attained, or which cannot be exceeded,' and 'insulate the individual from comparison with all other candidates for the available seats.' In contrast, 'a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself . . . .'"[65]

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[64] Suppose in this hypothetical that the school's method of evaluating diversity is to employ a gestalt approach to the diversity category, so that a candidate can earn a score between 0 and 15, based on an evaluator's review of all of the diversity criteria, including race. However, no single diversity factor, including race, can account for more than one-half of the diversity score. Consider then a specific application of the policy, comparing four students: A, B, C, and D. Applicants "A" and "C" are underrepresented racial minority students, and "B" and "D" are white students. If a score of 70 is the cutoff for admission, applying the model might lead to the admission of "A" (minority) and "B" (white), but not "C" (minority) and "D" (white), because the individualized reviews of each applicant's file produced the following results:

	A (minority)	B (white)	C (minority)	D (white)
Grade Point Averaage	42	30	35	44
Standardized Test Scores	12	13	10	15
Life Experiences	10	15	12	5
Diversity Factors	6	12	10	2
TOTAL:	70	70	67	66

In this example, "A" has strong grades and a good test score, and also gains points for life experience and adding to the diversity of the class. "B" does not have high grades, but has very strong life experience and diversity scores. "C" has good grades, a modest test score, and carries relatively strong life experience and diversity characteristics. "D" has very high grades and test scores, but limited life experiences and few diversity characteristics. One might assume that "A" received a racial "plus" that have helped "A" gain admission. "B" no doubt gained admission with the help of strong life experience and diversity characteristics that made up for weaker grades. "C" may also have received a plus for race and other diversity factors, but it was not enough to overcome shortcomings in other areas. "D" scored high on grades and test scores, but simply lacked the experiences and attributes that would add significantly to the diversity of the student body. A real admissions model could be much more nuanced, relying on weighted indices and more explicit variables. The purpose of this hypothetical is not to propose a model admissions policy, but simply to illustrate that a numerical system can comply with the requirements of *Grutter* and *Gratz*.

[65] *Grutter*, 2003 WL 21433492, at *18 (citations omitted).

"Critical mass" represents the Law School's particular label for setting numerical goals, but it is not the only type of approach that an institution might adopt to comply with *Grutter* and *Gratz*. An institution could choose not to have *any* numerical goals for admitting minority students, although such a strategy, while insulating the institution from attack on the basis of using a quota, could impair the institution's ability to measure the effectiveness of its race-conscious policy in relation to race-neutral policies and to determine whether its policy should be modified or ended after periodic review.

Another approach is to adopt specific numerical targets that are adjusted each season after periodic review – a strategy that is commonly used in employment settings. A target number is not an admissions quota and need not compromise individualized review. The number merely reflects a goal that the university seeks to attain, and the actual number of admittees and enrollees may fall above or below the goal in any given year.[66] Moreover, "some attention to numbers" is clearly permissible, and the *Grutter* Court endorsed the Law School's regular monitoring of the number of minority admittees during its admissions season. As long as monitoring does not compromise individualized review and race is not given "any more or less weight" based on the information contained in monitoring reports, the process should comply with constitutional requirements.[67]

C. Recruitment, Financial Aid, and Support Policies

In addition to justifying race-conscious admissions policies, the compelling interest in student body diversity can justify the use of other race-conscious programs in higher education, such as outreach and recruitment, scholarship, and retention and support programs. Financial aid and support programs can be especially important because they can help ensure that a diverse student body is actually enrolled and is maintained during the academic year, and not just admitted. These other types of higher education policies must, of course, comply with the Court's narrow tailoring requirements, which, at least in the context of admissions, include having sufficient flexibility, considering race-neutral alternatives and burdens on non-minority students, and having time limits.

A number of questions raised in the aftermath of the *Grutter* and *Gratz* cases revolve around the comparability of admissions policies and other types of policies designed to promote diversity. For example, should a race-conscious financial aid policy be subject to the same narrow tailoring analysis as an admissions program? Could a recruitment and outreach program target only racial minorities because it involves a benefit that differs from an admissions decision? Are race-*exclusive* scholarship and preparation programs constitutional? The *Grutter* and *Gratz* opinions are silent on these specific questions, but it is possible to draw some distinctions among the policies that could justify their use.

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[66] Indeed, as the tables in the dissenting opinions of Chief Justice Rehnquist and Justice Kennedy in *Grutter* suggest, the Law School itself may have employed not just target numbers but target percentages for minority groups over several years, yet the Court explicitly rejected the dissents' arguments of racial balancing and manipulation of the review process because the actual percentages of enrolled minority students differed substantially from their representation in the applicant pool and varied considerably from year to year.

[67] *Grutter*, 2003 WL 21433492, at *19.

One method is to focus on the nature of the interest and the different benefits and burdens attached to the interest. An admissions decision involves a much stronger interest than, say, a recruitment visit. The benefits are greater in the admissions context (admission to the university versus increased information) and the burdens are weaker and more diffused in the recruitment context (less knowledge about the university versus a denial of admission). A similar analysis could be applied to a comparison of other race-conscious policies. Academic preparation programs may provide access to a special benefit – better or more equalized preparation for regular classes – but may not impose a significant burden – the extra preparation is not needed to succeed in regular classes. Scholarships and other forms of financial aid may, however, involve a stronger interest than other non-admissions policies because the assistance may, in some instances, determine whether an individual can attend the university at all.[68]

It is not clear how the courts might adjudge the constitutionality of race-exclusive or race-predominant programs after *Grutter* and *Gratz*. Race-exclusive policies are clearly prohibited in the admissions context, and the Court's requirement of using race as only one of many factors in admissions might suggest that race-exclusive policies run contrary to the spirit of *Grutter* and *Gratz*, if not the law. On the other hand, important distinctions can be made between admissions policies and other types of programs, implying that the courts should employ an analysis that differs from the admissions analysis used in *Grutter* and *Gratz*. This Paper offers only a cursory discussion of the issue, and, as they embark on reviews of their policies and programs designed to promote student body diversity, institutions should engage in a more thorough analysis of the legal questions involving race-exclusive programs.[69]

III. Impact on Related Areas of Race-Conscious Policy Making

With *Grutter* and *Gratz*, the Supreme Court has dispelled the notion that remedying past discrimination is the only interest that can justify a narrowly tailored race-conscious policy. As the Court emphasized in its *Grutter* opinion, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause"[70] and strict scrutiny does not imply fatal scrutiny. Some may suggest that the University of Michigan cases have limited application outside the context of higher education, because of the unique academic freedoms to which the Court deferred in *Grutter* and *Gratz*. On the other hand, the *Grutter* Court's strong and expansive language addressing the value of diversity in education and other sectors of American life provides at least partial support for arguing that diversity can be a constitutionally compelling interest in other areas, such as K-12 public education and employment. A thorough analysis of these other areas is beyond the scope of this Paper, but some general observations may be useful.

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[68] In the context of promoting a remedial interest, one court has struck down a race-exclusive scholarship program for failing to satisfy a strict scrutiny analysis. *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

[69] A policy guidance on race-conscious financial aid policies issued by the Department of Education in 1994 provides a starting point for analyzing these types of programs. *See* 59 Fed. Reg. 8756, 8757 (Feb. 23, 1994) (indicating that "a college may use race or national origin as a condition of eligibility in awarding financial aid if this use is narrowly tailored, or in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria").

[70] *Grutter*, 2003 WL 21433492, at *13.

A. K-12 Public Education

The Supreme Court cited and quoted a number of landmark decisions involving K-12 education in its *Grutter* opinion, including *Brown v. Board of Education.* Among the Court's statements in *Grutter*: "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."[71] As in higher education, the educational benefits of student body diversity in elementary and secondary education are well documented in the scientific literature,[72] and the interest in K-12 diversity is arguably just as strong, if not stronger because of *Brown's* desegregation mandate. As the Washington Supreme Court recently stated: "The goals of teaching tolerance and cooperation among the races, of molding values free of racial prejudice, of preventing minority students from becoming isolated from the rest of the educational system, and eliminating or preventing the emergence of a problematic class of 'minority schools' are integral to the mission of public schools."[73]

It is important to recognize, though, that there are differences in the settings and the interests that may be advanced in elementary and secondary education versus higher education. Some differences weigh against a reliance on *Grutter* and *Gratz:* K-12 decision makers may not enjoy the same academic freedoms as their higher education counterparts, and among the educational benefits of diversity in higher education is the "robust exchange of ideas," which is less applicable to education in the lower grade levels. Some differences suggest deprivations in K-12 settings impose lighter burdens on students and thus ease the narrow tailoring inquiry: unlike higher education, most K-12 opportunities are interchangeable – students who are denied access to a particular elementary or secondary school through a race-conscious assignment policy can still attend another public school. Still other differences suggest that the interests are much more significant in K-12 than in higher education: K-12 education is compulsory, and because of the line of school desegregation cases dating back to *Brown v. Board of Education,* a focus on integration and *racial* diversity has stronger resonance in the elementary and secondary educational arenas.

In addressing legal challenges to race-conscious diversity admissions policies and voluntary desegregation efforts in K-12 education, the lower courts have yielded mixed results. Prior to *Grutter* and *Gratz,* a number of courts assumed that the interest in educational diversity in K-12 was compelling under *Bakke,* although they struck down race-conscious admissions and

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[71] *Id.* at 16 (quoting Plyler v. Doe, 457 U. S. 202, 221 (1982)).

[72] *See, e.g.,* Robert L. Crain, *School Integration and the Academic Achievement of Negroes,* 44 Soc. Educ. 1 (1971); Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis,* 88 Am. J. Soc. 839 (1983); Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 111 (Gary Orfield with Michal Kurlaender eds. 2001); Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research, in* Diversity Challenged, *supra*; Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation,* 64 Rev. Educ. Res. 531 (1994); *see also* Brief of the National Education Association, et al., *Grutter v. Bollinger & Gratz v. Bollinger,* 2003 WL 400774 (citing additional studies).

[73] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 2003 WL 21467291, at *11 (June 26, 2003).

student assignment policies on narrow tailoring grounds.[74] Other courts have held that the compelling interest in reducing racial isolation in K-12 education can justify the use of race-conscious student assignment plans;[75] but one court has held that the interest in *preventing* racial isolation is not compelling because it is too speculative.[76] Addressing a challenge to a race-conscious voluntary transfer policy, one federal district court recently recognized several compelling interests in K-12 education, including promoting racial and ethnic diversity, increasing educational opportunities for all students, reducing racial isolation, and providing an education to all students that satisfies federal constitutional mandates.[77]

In the coming months and years, decisions by the federal courts of appeals and the Supreme Court can be expected to clarify the parallels between elementary and secondary education and higher education.

B. Government and Employment

One of the benefits of student body diversity identified by the *Grutter* Court is the development of a diverse and integrated leadership that can serves the needs of government, business, and the military. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[78] If higher education is only one segment of a path that leads to good citizenship and leadership, it should follow that other institutions along that path can advance comparable interests in diversity that employ narrowly tailored race-conscious measures. The Court did not address the constitutionality of interests such as promoting diversity in government employment or diversity on the faculties of public universities, but *Grutter* offers strong language to support these types of interests.

In private-sector employment, the basic legality of voluntary race- and gender-conscious affirmative action under Title VII of the Civil Rights Act of 1964 is well established. In *United Steelworkers of America v. Weber*, the Supreme Court upheld the use of race-conscious affirmative action policies that correct a conspicuous racial imbalance in traditionally segregated job categories, but do not "unnecessarily trammel" the interests of non-minorities and do not pose a bar to their advancement.[79] In *Johnson v. Transportation Agency*,[80] the Court expanded this analysis to gender-conscious affirmative action programs and specifically endorsed the use of a "plus" factor in hiring and promotions decisions.[81]

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[74] *See* Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir.), *cert. denied*, 529 U.S. 1019 (1999); Tuttle v. Arlington County School Bd., 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998). It is beyond the scope of this Paper to address the specific applications of narrow tailoring in these K-12 cases, but the Supreme Court's narrow tailoring analyses in *Grutter* and *Gratz* differ in important ways from previous analyses and should prove instructive to courts in the future.

[75] *See* Brewer v. West Irondequoit Cent. School Dist., 212 F.3d 738 (2d Cir. 2000); Comfort *ex rel.* Neumeyer v. Lynn, 2003 WL 21299571 (D. Mass. June 6, 2003).

[76] Equal Open Enrollment Ass'n v. Board of Educ. of Akron City School Dist., 937 F. Supp. 700 (N.D. Ohio 1996).

[77] Comfort *ex rel.* Neumeyer v. Lynn, 2003 WL 21299571 (D. Mass June 6, 2003).

[78] *Grutter*, 2003 WL 21433492, at *17.

[79] 443 U.S. 193 (1979).

[80] 480 U.S. 616 (1987).

[81] The *Johnson* case involved a government employer, but the Court's ruling was limited to a Title VII analysis and did not address the constitutionality of the program under the equal protection clause.

Nonetheless, the lower courts have divided over diversity's strength as a justification for affirmative action under Title VII. For example, in *University and Community College System of Nevada v. Farmer*, the Nevada Supreme Court upheld a race-conscious faculty hiring plan under Title VII, ruling that "race must be only one of several factors used in evaluating applicants" and "the desirability of a racially diverse faculty [is] sufficiently analogous to the constitutionally permissible attainment of a racially diverse student body . . . ."[82] However, in *Taxman v. Board of Education of the Township of Piscataway*, the Third Circuit ruled that diversity did not provide a sufficient justification under Title VII for using race to make a termination decision between two employees.[83]

The Supreme Court's equal protection case law in employment is limited, and the constitutional case law on diversity in the lower courts is mixed. The Supreme Court ruled in *Wygant v. Board of Education* that an interest in remedying societal discrimination through the use of teacher role models was not a compelling interest that could justify a race-conscious layoff policy. In *Lutheran Church-Missouri Synod v. Federal Communications Commission*,[84] the D.C. Circuit held that diversity in programming was not a sufficiently compelling interest to justify a licensing program that encouraged stations to maintain a workforce that mirrored the racial diversity of surrounding communities.

On the other hand, courts have recently upheld the use of race-conscious hiring and promotion policies to advance an "operational need" in having a diverse police force that can serve a racially and ethnically diverse population.[85] For example, in *Patrolmen's Benevolent Association v. City of New York*, the Second Circuit "recognized that 'a law enforcement body's need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves,' may constitute a compelling state interest."[86]

The *Grutter* Court stressed that context is critical in strict scrutiny analysis, and the Court may be more inclined to uphold race-conscious policies in employment contexts that closely parallel the higher education context, where the benefits of diversity in the workplace are well documented and race is used as a "plus" factor in a non-mechanical hiring or promotion process that also considers non-racial factors and allows applicants to compete for jobs on an equal footing.

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[82] 113 Nev. 90, 97, 930 P.2d 730, 735 (1997).
[83] 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed*, 522 U.S. 1010 (1997).
[84] 141 F.3d 344 (D.C. Cir. 1998).
[85] *See* Patrolmen's Benevolent Assoc. v. City of New York, 310 F.3d 43 (2d Cir. 2002); Reynolds v. City of Chicago, 296 F.3d 524 (7th Cir. 2002); Petit v. City of Chicago, 239 F. Supp. 2d 761 (N.D. Ill. 2002); *see also* Cotter v. City of Boston, 323 F.3d 160, 172 n.10 (1st Cir. 2003) (declining to address question of compelling interest but expressing sympathy for "the argument that communities place more trust in a diverse police force and that the resulting trust reduces crime rates and improves policing").
[86] 310 F.3d at 52 (quoting Barhold v. Rodriguez, 863 F.2d 233, 238 (2d Cir. 1988)).

Conclusion

The *Grutter* and *Gratz* decisions have affirmed the underlying values of diversity in higher education and of racial integration in American society, and the cases provide clear guidelines for institutions to use in designing inclusive admissions policies. Yet, as the Court stated in *Grutter*, "race unfortunately still matters," and affirmative action will continue to be an issue that divides much of our country, notwithstanding our nation's broad commitment to equal educational opportunity. The University of Michigan decisions have settled one set of legal questions, but we can expect many more to arise in our courts and legislatures with the passage of time.

In *Brown v. Board of Education*, the Supreme Court observed that education is "the very foundation of good citizenship." Those words ring as true today as they did nearly fifty years ago. Considerable progress has been made in the past fifty years, but the University of Michigan cases remind us that progress has been slow and much remains to be done. The Court's more recent words, echoing *Brown*, are thus worth repeating: "Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."

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